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IN THE

Supreme Court of the United States

October Term, 1963

No. 1093

In the Matter of

ROBERT DONNELL McCREERY.

PETITION FOR WRIT OF CERTIORARI.

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In the Matter of

ROBERT DONNELL McCREERY.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice Earl Warren and to the Justices of the Supreme Court of the United States:

Your petitioner, Robert Donnell McCreery, respectfully petitions this honorable court for a Writ of Certiorari directed to the Appellate Dept. of the Superior Court of Los Angeles County, of the State of California, to review and reverse its decision affirming the judgment of the trial court and dismissing the Appeal from the order denying defendant's motion for a new trial.

Opinion Below.

No written opinion was reported and the only notification received was by postcard as follows:

"Appellate Department

Superior Court, Los Angeles County, California.

No. CR A 5564.

People vs. McCreery.

Judgment in the above entitled appeal is affirmed; appeal from order dismissed. Judgment filed.

Date Jan. 13, 1964.

William G. Sharp, Co. Clerk, by: J. MacGregor, Deputy."

Jurisdiction.

The judgment of the Appellate Dept. of the Superior Court of Los Angeles County, California was entered on January 13, 1964. Petition for Rehearing and/or Certification to the California District Court of Appeal, Second District, was denied on January 29 1964. The Appellate Dept. of the Superior Court of Los Angeles County is the highest court in California in which decision could be had.

California Constitution Art. VI, Sec. 5;
California Penal Code, 1471;
Talley v. Calif., 362 U. S. 60, 62.

Questions Presented.

The Appellate Dept. of the Superior Court of Los Angeles County affirmed the Los Angeles Municipal Court conviction of the Petitioner of disorderly conduct under California Penal Code sec. 647(a) which proscribes the solicitation to engage or the engaging in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view. The questions presented and discussed herein are:

1. Whether petitioner's conviction violated the due process clause of the 14th Amendment of U. S. Constitution because the record is absolutely devoid of evidence proving essential elements of the offense.

2. Whether the due process clause of the 14th Amendment of The United States Constitution was violated by petitioner's conviction under a state statute so vague and indefinite that it fails to give fair notice or afford an ascertainable standard of criminal conduct as applied to the circumstances of this case.

3. Whether the due process clause of the 14th Amendment of The United States Constitution was violated by petitioner's conviction under a state statute so vague and indefinite on its face that it fails to give fair notice or afford an ascertainable standard of criminal conduct.

4. Whether Article 1, Sec. 10, of the United States Constitution was violated by petitioner's conviction under a State statute that, as applied to the circumstances of this case, is *ex post facto*.

Statutory and Constitutional Provisions Involved.

1. The 14th Amendment to the Constitution of The United States.

2. Article 1, Sec. 10 of the Constitution of The United States.

3. The California statutory provision involved is California Penal Code Section 647.

> "Every person who commits any of the following acts shall be guilty of disorderly conduct, a misdemeanor:
>
> (a) Who solicits anyone to engage in or who engages in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view.
>
> (b) Who solicits or who engages in any act of prostitution.
>
> (c) Who accosts other persons in any public place or in any place open to the public for the purpose of begging or soliciting alms.

(d) Who loiters in or about any toilet open to the public for the purpose of engaging in or soliciting any lewd or lascivious or any unlawful act.

(e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.

(f) Who is found in any public place under the influence of intoxicating liquor and any drug, in such a condition that he is unable to exercise care for his own safety or the safety of others, or by reason of his being under the influence of intoxicating liquor, or any drug, or the combined influence of intoxicating liquor and any drug, interferes with or obstructs or prevents the free use of any street, sidewalk or other public way.

(g) Who loiters, prowls or wanders upon the private property of another, in the night time, without visible or lawful business with the owner or occupant thereof, or who, while loitering, prowling or wandering upon the private property of another, in the nighttime, peeks in the door or window of any inhabited building or structure located thereon, without visible or lawful business with the owner or occupant thereof.

(h) Who lodges in any building, structure or place, whether public or private, without the permission of the owner or person entitled to the possession or in control thereof".

Statement of the Case.

The State of California, acting through a police officer of the city of Los Angeles, arrested the petitioner for an alleged violation of a State statute, California PC §647(a), which proscribes as disorderly conduct (a misdemeanor) anyone "who solicits anyone to engage in or who engages in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view."

The evidence at the trial shows without contradiction that on March 16, 1963, petitioner was seated on a commode, enclosed within a partition, in a men's rest room located outside the restaurant proper, but belonging to said restaurant and located on its parking lot [R. T. p. 6]*

The restroom was presumptively private, indicated by Sec. 28457, Calif. Health & Safety Code ("Toilet facilities shall be provided convenient to the employees . . . "). Nevertheless, the arresting officer, in "full uniform" [R. T. p. 10], entered the restroom, arrested the petitioner for the sole reason that he was "beating his meat" [R. T. p. 33] although alone in the restroom [R. T. p. 6]. No evidence was introduced at the trial that the restroom was either a public place, a place open to the public or a place exposed to public view—one of which said conditions is made an element of the statute under which the petitioner was convicted. Nor was evidence introduced of a "solicitation" through the trial court [R. T. ....].

As a matter of fact, the City Attorney of the City of Los Angeles (Prosecutor) in his reply brief to the

*[R. T. refers to the Reporter's Transcript of proceedings, Friday, August 9, 1963, and Monday, August 12, 1963.]

Appellate Dept. of the Superior Court, admitted that no evidence of solicitation was offered to the trial court.

After trial by a judge of the Municipal Court of the Los Angeles Judicial District, a jury having been waived, the petitioner was convicted of a violation of PC§647(a), the judge making the following sole finding [R. T. p. 41]: "The court finds the defendant guilty as charged. There is no question in the court's mind of the defendant's guilt at all, not the slightest." (The defendant was charged in the complaint in the statutory language). The finding of "guilty" by the trial court, the omission of opinion by the Appellate Dept. of the Superior Court of Los Angeles County on petitioner's appeal thereto, leaves the sole inference that petitioner was convicted for "masturbation" in a presumptively private place—no evidence having been introduced that the said men's restroom was "public"; "open to the public or exposed to public view". Nor is there indication that any judicial notice was attempted to be taken or taken [R. T. p.....].

How the Federal Questions are Presented.

The federal questions sought to be reviewed here were raised in the court of the first instance on May 1, 1963 in petitioner's motion to set aside the complaint under Cal. PC§995 and demurrer to complaint pursuant to Cal. PC§1004, as follows:

> "2. That defendant's constitutional rights of privacy were violated in that illegal search was used to obtain evidence which is the sole basis for the issuance of the complaint against the defendant."

The motion and demurrer were overruled (except to, without reservation of exceptions under California law).

Petitioner again asserted the federal questions at the trial [R. T. pp. 3, 4] when the arresting officer was testifying to seeing the defendant—petitioner's attorney stating:

> "At this time I will make a motion to exclude the testimony of this witness on the grounds that there has been an unlawful search and seizure on the part of the police in this matter, and they have violated my client's constitutional rights."

Petitioner raised the federal questions before the Appellate Dept. of the Superior Court of Los Angeles County in his Opening Brief (p. 2) in the following manner:

> "The prosecution offered no evidence that there was an act or solicitation at a public place, or a place exposed to public view or a place open to the public. . . .
>
> "'It is a fundamental rule of criminal procedure that in the trial of an action wherein a defendant is charged with the commission of a crime, the prosecution is required to prove *every element* of the offense beyond a reasonable doubt. . . .'" (cit. omitted)

(*Cf. Torrance v. Salzinger*, 297 F. 2d 902, 905:

> "Only very recently has the Supreme Court undertaken to set aside state convictions as inconsistent with due process of law because they were not supported by proof of some essential element of the alleged crime . . ." (cit. omitted).

The appeal was denied by the Appellate Dept. of the Superior Court of Los Angeles Co. without opinion.

REASONS ADVANCED FOR GRANTING THE WRIT.

I.

The Decision Below Conflicts With Decisions of This Court on Important Issues Affecting Federal Constitutional Rights.

A. The Decision Below Affirms a Criminal Conviction Based Upon No Evidence of Guilt and Therefore Conflicts With This Court's Decision in Thompson v. City of Louisville, 362 U. S. 199 and Garner v. State of Louisiana, 368 U. S. 157.

The trial court found the petitioner "guilty as charged" without reference to any of the evidence presented or to any specific terms of the statute. On petitioner's appeal to the Appellate Dept. of the Superior Court, county of Los Angeles, the judgment of the lower court was affirmed without opinion.

It is submitted that none of the evidence presented supports the conclusion of the trial court, if there is any meaning given to the word "public". The record indicates only that petitioner was observed masturbating alone on a commode in a men's toilet located outside a restaurant. No evidence was introduced that this men's toilet was a "public place or a place open to the public of a place exposed to public view"—as set forth in the statute. Nor was evidence introduced to rebut the presumption of a statute of the Health & Safety Code of Calif. that the place was reserved for the private use of the employees of the restaurant (Health & Safety Code §28457).

There is no testimony in the record that a member of the public observed the petitioner and complained to the police; nor is there testimony that members of the public were accustomed to or permitted to use the

place. Nothing in the record shows that judicial notice was taken that the men's toilet in question was a "public place, or a place open to the public or a place exposed to public view". In this regard, the court stated, in *Garner v. Louisiana*, 7 L. ed. 2d 207, 219, 368 U. S. 157, 173:

> ". . . There is nothing in the records to indicate that the trial judge did in fact take judicial notice of anything. To extend the doctrine of judicial notice to the length pressed by the respondent would require us to allow the prosecution to do through argument to this Court what it is required by due process to do at the trial, and would be 'to turn the doctrine into a pretext for dispensing with a trial'. . ." (cit. omitted).

There was no evidence introduced of a solicitation. The only testimony in the record introduced as purported proof of a "lewd or dissolute act" was that the arresting officer had observed the petitioner alone on a commode in a men's toilet in an act of masturbation and had arrested him for this sole act [R. T., p. 33] —"for beating his meat."

Solitary masturbation has not been designated as criminal conduct, or as a "lewd or dissolute act" in California, either by statute or case law. Neither the common law, the law in other United States jurisdictions, nor the substantive law of the United States imposes criminal sanctions for the alleged act.

It has often been held that "in cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of the lower courts, but will reexamine the evidentiary basis on which those conclusions are founded." *Niemotko*

v. Maryland, 340 U. S. 268, 271, 95 L. ed. 267, 270, 71 S. Ct. 325, 328 (recently reaffirmed in *Napue v. Illinois*, 360 U. S. 264, 272, 3 L. ed. 2d 1217, 1222, 79 S. Ct. 1173.)

Thus in *Thompson v. City of Louisville*, 362 U. S. 199, 4 L. ed. 2d 654, 80 S. Ct. 624, and in *Garner v. State of Louisiana*, 368 U. S. 157, 7 L. ed. 2d 207, 82 S. Ct. 248, this court examined the evidence on which convictions of disorderly conduct were based and determined the convictions were void. This case is similar to the *Thompson* case in which the petitioner merely shuffled his feet, alone, on a dance floor, while waiting for a bus, and then argued with police when arrested; and similar to the *Garner* case, in which petitioners were convicted for merely sitting at a counter reserved for white people.

It has never been held a violation of law to sit, alone in a men's toilet in an act of masturbation and there is absolutely nothing in the record to indicate petitioner did anything more.

Here, as in *Thompson*, there is "no evidence whatever in the record to support these convictions. Just as 'conviction upon a charge not made would be sheer denial of due process' so is it a violation of due process to convict and punish a man without evidence of his guilt." (362 U. S. at 206, 4 L. ed. 2d at 659.)

"The conviction herein is in sharp contradiction with the law as this Court declared it in *Thompson* and

Garner. A full hearing should be granted so this Court may consider the grave constitutional issue implicit in this conflict.

As stated in *Garner v. Louisiana*, 7 L. ed. 2d 207 at 214:

> ". . . it is as much a denial of due process to send an accused to prison following conviction for a charge that was never made as if is to convict him upon a charge for which there is no evidence to support that conviction."

and recently the Court said in *Parr v. United States*, 363 U. S. 370, 384, 4 L. ed. 2d 1277, 1292:

> ". . . Under our vaunted legal system, no man, however bad his behavior, may be convicted of a crime of which he was not charged, proven and found guilty in accordance with due process."

B. Petitioner Was Convicted of a Crime Under the Provisions of a State Statute Which as Applied to Convict Him Is so Vague, Indefinite, and Uncertain as to Offend the Due Process Clause of the 14th Amendment as Construed in Applicable Decisions of This Court.

Petitioner was charged and convicted of a violation of Sec. 647(a) of the California Penal Code, which prohibits engaging in a "lewd and dissolute act". As pointed out in section A *supra*, masturbation has never been held criminal in California, or in the common law of the United States or England or the statutory law of the United States. There is nothing in the decisions of the California courts to afford the petitioner warning that his conduct in the instant case was criminally punishable.

Nor does the language of the statute itself provide adequate notice, as implied in the comment of Justice Black in his dissent in *Edelman v. California*, 97 L. ed. 287, at 394, 344 U. S. 357, at 365:

> "The dictionary definition of dissolute given to the jury by the court described a crime of such nebulous amplitude that *no person could know how to defend himself.* The court said: 'Now, dissolute is defined as "loosed from restraint, unashamed, lawless, loose in morals and conduct, recklessly abandoned to sensual pleasures, profligate, wanton, lewd, debauched." Now, the word "dissolute" as you see from this definition covers many acts not necessarily confined to immorality. Other laxness and looseness and lawlessness may amount to dissoluteness.'" (Emphasis supplied.)

Cf. the definition of "lewd" in Webster's New International Dictionary, 3d edition: "Lewd"—2a: sexually unchaste or licentious: Dissolute, Lascivious; b: suggestive of or tending to moral looseness: inciting to sensual desire or imagination: Indecent, Obscene, Salacious (novelists looked upon it as a lewd distraction—Lewis Mumford) (loud lewd dissonances from the . . . orchestra in the pit—Time) (the hawk stood . . . with his lewd purple tongue lolling from his open beack—Liam O'Flaherty).

This court has frequently stated that criminal laws must be sufficiently specific to give adequate notice as to what is criminal conduct. In *Lanzetta v. New Jersey*, 83 L. ed. 888, 890, 306 U. S. 451, 453, the court held that, "All are entitled to be informed as to what the state commands or forbids." (And see also *United States v. L. Cohen Grocery*, 255 U. S. 81, 89;

Connally v. General Const. Co., 269 U. S. 385; *Raley v. Ohio*, 3 L. ed. 2d 1344, 360 U. S. 423)

The conviction of petitioner under a statute so vague violates traditional concepts of fair play inherent in the due process clause of the 14th Amendment.

C. Petitioner Was Convicted of a Crime Under the Provisions of a State Statute Which Is Void on Its Face Since It Is so Vague, Indefinite, and Uncertain as to Offend the Due Process Clause of the 14th Amendment as Construed in Applicable Decisions of This Court.

As evident in the preceding section, the terms of the statute, "lewd or dissolute" are so vague and indefinite that it is virtually impossible to draw the line between criminal and innocent conduct. In *McBoyle v. United States*, 283 U. S. 25, 27, the Court said that

> "although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand of what the law intends to do if a certain line is passed."

There is no requirement of knowledge in the statute under which petitioner was convicted. And the words of the statute afford no adequate warning. This case is similar to *Lambert v. Calif.*, 355 U. S. 225, 2 L. ed. 2d 228, in which this court held unconstitutional an ordinance that required no proof of knowledge of its requirements to constitute a violation

> "Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the

evil would be as great as it is when the law is written in print too fine to read *or in a language foreign to the community.*" 355 U. S. 229-230; 2 L. ed. 2d 232. (Emphasis supplied.) See also, *Morrissette v. United States*, 343 U. S. 246.

The conviction herein is in conflict with the statement in *Lambert* (355 U. S. 229, 2 L. ed. 2d 232) that "actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand." A hearing should be granted to resolve the serious constitutional issue presented.

D. Petitioner Has Been Convicted of a Crime Under a State Statute That as Applied to Him Violates the ex Post Facto Clause of Article I, Sec. 10 of the United States Constitution.

As explained in the preceding sections, the statute under which petitioner was convicted is so vague and indefinite that the police and courts have been given carte blanche to determine, after the fact, whether one shall be charged with or convicted of its violation.

There is no ascertainable standard of conduct and the petitioner has been convicted of a crime for conduct which has no precedent as criminal.

> "It is both unjust and impractical to jail people for behavior widely regarded as a matter of indifference to society. Criminal sanctions must be reserved for misbehavior that is quite generally recognized as a threat to individual security, and is therefore reprobated by common consent." A.L.I. Model Penal Code Sec. 207. 210 Comments, p. 8 (Tent. Draft No. 6, 1957).

In *Calder v. Bull*, 3 Dall. U. S. 386, 1 L. ed. 648, the court included in its definition of *ex post facto* laws,

> "Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. . . ."

If the holding below be allowed to stand, this court will, in effect, be lending approval to a statute so vague that the police will be free to arrest and the courts free to convict, *ad hoc*, and after the fact, in accordance with their varying and individual moral sentiments and nothing more.

Conclusion.

Wherefore, for the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Dated: April 21, 1964.

Respectfully submitted,

JOHN N. FROLICH,
Attorney for Petitioner.